No. 05-908

Supreme Court, U.S.
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In The

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF TIMOTHY DON-HUGH MAK IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)?

2. Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

3. May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely by reason of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

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AN APOLOGY

This brief has been prepared without the assistance of outside counsel. I have been unable to locate an attorney admitted to the Supreme Court bar willing to be on the brief formally, despite concerted efforts to find one.[1]

However, universal consents for amicus curiae briefs have been received in both cases. I also note the clear precedent set in this Court's acceptance of the *unrepresented* amicus curiae brief of Duane C. Ellison in *Gratz v. Bollinger*, 539 U.S. 244 (2003). It would be deeply regrettable if the matters I have to raise were denied access to this Court *merely* by reason of lack of legal representation, particularly given that I myself am a practicing attorney, having studied law in the United States.[2] I respectfully seek the Court's leave to submit this brief.

INTEREST OF AMICUS CURIAE

I am a practicing commercial lawyer, having completed an M.A. from the Fletcher School of Law and Diplomacy and an LL.M. from Columbia University. Although I currently live and practice law in Australia, I have completed extensive post-graduate studies in the U.S.[3]

Whilst living in the United States over ten years ago, I personally challenged the legality of affirmative action. I believe I was the first person to question the legality of race-based affirmative action programs in Law Schools in the United States; and the first person to point out the

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[1] Despite the sympathetic words of some regarding the contents of this brief, the like-minded were conflicted out; those available were not interested.

[2] I am *not* admitted to the Supreme Court bar.

[3] I have also taught law and published in peer-reviewed academic journals on the topic of international law. See Timothy D. Mak, *The Case Against an International War Crimes Tribunal for the former Yugoslavia*, International Peacekeeping (London), Vol. 2, No. 4, 536-563 (1995). I note that the views expressed herein are exclusively my own and unrelated to any organization or employer.

deleterious effects of these policies on Asian students in particular.

I raised these issues in the matter of *Mak v. Trustees of Harvard,*[4] a case that was subsequently dismissed on the grounds of "inadequate pleading."

After completing my legal studies in the U.S., I left the country and spoke to no one about this dispute, having unilaterally resolved to keep this matter confidential following the ending of legal proceedings. I came to the view that I had no moral right to raise these matters further, and began a new legal career in Australia.

I have remained silent on these matters for over ten years, believing this was a matter for the U.S. education system to resolve, and for the U.S. legal system to address.

However, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a number of issues I raised over ten years ago were not ventilated, despite my earlier attempts to make these matters known. I now regret not attempting to raise these issues earlier, and I wish to present to the Court a number of arguments which, if taken seriously, will fundamentally change the nature of the debate over affirmative action.

Finally, and most importantly, I now have a special interest in this matter, as my precious niece and nephew are, proudly, citizens of your Nation. This means that my niece and nephew, just entering the public high school system, will be faced with being stereotyped by race and with the "stigma" of having the Asian "Mak" surname. This Asian "stigma" could, under the current affirmative action policies practiced throughout the public education system, greatly disadvantage them in their choice of high school and, later, university.

Based on the above, I contend that I have a long-standing, vital, interest and a detailed knowledge of the

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[4] I destroyed all correspondence relating to my challenge to affirmative action, and no longer have a citation for the 2nd Circuit, 1995 case. Robert W. Iuliano was the lawyer with whom I corresponded in relation to the case. He can be contacted at the Holyoke Center, Suite 980, 1350 Massachusetts Avenue, Cambridge, MA 02138-3834.

issues surrounding affirmative action. I further suggest that, unlike many of the established liberal lobby groups and interested parties who have lodged a weighty plethora of amicus curiae briefs in support of affirmative action, and who monotonously repeat the same mantra in favor of affirmative action, I have something *genuinely new* to contribute to the debate.

SUMMARY OF ARGUMENT

After ten years of silence, I re-enter the affirmative action debate to identify the inherently flawed logic and fundamental illegality of the policy.

I seek to attack the very foundations of the majority's reasoning in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In doing so, I seek to persuade the Court to consider overturning this admittedly recent decision. If this is not possible, I ask for the decision to be strictly distinguished and quarantined to ensure its deleterious effects do not extend beyond a small number of elite colleges and universities.

First, I will show that the ostensibly socially inclusive, "ameliorative," policy of affirmative action is inextricably linked to a policy of racial *exclusion*. Instead of focusing on those who are admitted, who predictably argue they benefit from the policy, the real legal obligation on the part of affirmative action proponents is to prove that the burdens of exclusion – the negative effects of affirmative action – are fairly and equitably distributed across the rest of the population. There is now statistically verifiable evidence indicating that the negative effects of affirmative action are not "diffused" evenly through the population, but are "focused," and *burden one racial group in particular*.

It is important to note that this concentration of the ill-effects of affirmative action may *not* be intentional. It may simply be an inevitable side-effect of the policy – the equivalent of "collateral damage" in military terms. However, at the very least it would be grossly negligent of any policy maker to ignore these effects if they were obvious and statistically verifiable. Moreover, if these effects were known, this would be clear evidence of *mala*

fides towards that particular racial group, and this would then remove the presumption of good faith permitted by the plurality in *Grutter*.

Second, I will reveal the identity of the particular racial group *almost exclusively* disadvantaged by affirmative action.

Third, I will draw out the deep flaws in the legal reasoning underlying the plurality opinion in *Grutter*.

Finally, I will suggest a way forward in relation to the matters arising in this case, showing that race-neutral alternatives are readily available and easily implemented.

PRELIMINARY MATTERS

I have the deepest respect for the legal system of the United States and believe strongly in American principles of individual freedom and equality before the law. However, I do not wish to re-enter this debate to contribute dispassionately, but rather to passionately, forcefully, *argue*. In doing so, I do not wish *in any way* to have my words interpreted as insolent towards or disrespectful of this powerful Nation or its institutions. I am aware of the sensitivity of the issues to be addressed, but must cast aside any concerns about offending others if my arguments are to be presented as forcefully as possible.

I was inspired to speak out in this debate after reading Justice Scalia's comment in his dissent in *Grutter*, 539 U.S. at 349:

> Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass."

Who are these "minority groups"?

Justice Scalia also raised this point in the course of oral argument:

> The people you want to talk to are the high school seniors who have seen – who have seen people visibly less qualified than they are get into prestigious institutions where they are rejected. If you

> think that is not creating resentment, you are just wrong.[5]

In response, counsel for the respondents stated that the burden of this rejection was "a very small and diffuse burden" and was "extremely limited in scope and relative to the benefits to students of all races and to our Nation."[6]

I seek to answer Justice Scalia's provocative challenge.

THE REAL EFFECT OF AFFIRMATIVE ACTION

Nothing can be said today on the issue of affirmative action without referring to two seminal peer reviewed academic works in the area: Professor Richard H. Sandler's 2004 study in the area of law school admissions,[7] and the extraordinary statistical study published by Espenshade and Chung in June 2005.[8]

The Espenshade and Chung study is the most comprehensive and rigorous statistical analysis ever conducted on the effects of affirmative action. They studied 124,374 student applications to elite universities, and applied statistical regression analysis to determine precisely who benefited and who was disadvantaged by affirmative action. Their conclusions were striking. In terms of SAT points (under the old 1600 point scale) they found the following disadvantage/advantage relationship by the application of affirmative action to the various "racial" and other "groupings" used by admissions officers:

- Blacks: +230
- Hispanics: +185
- Asians: -50

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[5] Pp. 51-52 of the Transcript of Oral Argument in *Grutter*, 539 U.S. 306.

[6] *Id.* at 53.

[7] Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stanford Law Review 367 (2004).

[8] Thomas J. Espenshade and Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, Social Science Quarterly, Volume 86, Number 2 (June 2005).

- Recruited athletes: +200
- Legacies (children of alumni): +16

They found white admission rates almost completely *unaffected* by affirmative action.

The inevitable conclusion: Asian-Americans pay by far the *greatest* penalty in allowing blacks, Hispanics and legacies through to elite universities.

Affirmative action is almost *exclusively* "paid for" by Asian-American students.

The conclusions of this "surprising" and extraordinarily detailed statistical regression analysis have not been seriously challenged in the academic literature.

Ms. Mahoney's words are now deeply ironic. She stood up before this Court and solemnly declared that the burden of the rejection caused by affirmative action was "a very small and diffuse burden" and was "extremely limited in scope and relative to the benefits to students of all races and to our Nation."[9]

It is only "small" if you do not regard Asian-Americans as worthy of the same rights as other minorities.

It is only "diffuse" if you regard the systematic rejection of Asian-American students as merely faceless "collateral damage" in the pursuit of the ideal "racial" mix the "aestheticists"[10] so desire.

The Sandler study is even more striking. Affirmative action proponents may wish to argue that the systematic rejection of qualified Asian-American students is "worth it" in order to see disadvantaged blacks and Hispanics progress. The Sandler study shows that this argument is bereft of any substance. Predictably, his study establishes that those accepted under affirmative action drop out at far greater rates, and achieve substantially lower scores that the rest of the student population. The ostensible "beneficiaries" don't really "benefit" at all.

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[9] Page 53 of the Transcript of Oral Argument.

[10] Using the term coined by Justice Thomas in *Grutter*, 539 U.S. at 375.

This is the very point Justice Thomas makes in his passionate dissent in *Grutter*, 539 U.S. at 375:

> The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. . . . Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue – in selection for the Michigan Law Review. . . . and in hiring at law firms and for judicial clerkships – until the "beneficiaries" are no longer tolerated.

So, who are the *only* statistically verifiable beneficiaries of affirmative action?

It is an inevitable conclusion of this analysis that the white "Establishment"[11] are those who benefit most from the current policy of affirmative action.

The equation is this:

> Systematic rejection of "over-qualified"[12] Asians + Systematic acceptance of under-qualified minorities[13] = Systematically higher rates of academic "success"[14]

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[11] I use the terms "established" and "Establishment" in a strictly literal, not colloquial, sense. The "Establishment" in this context means those "pre-existing" students who are *unaffected* by (or rather protected from) the effects of affirmative action, including the recipients of legacies. The abovementioned statistical analysis *verifiably* establishes that the racial identity of this unaffected "established" group happens to be "white."

[12] I use the term "over-qualified" literally *and* figuratively: literally in the sense that Asians appear to be systematically rejected *even though* they have the qualifications for admission; figuratively in the sense that I contend they're not wanted *because* they represent a "threat" to the academic success of the "established" white student population.

[13] Who according to the Sandler study perform *relatively* poorly, compared to the rest of the admitted student pool.

[14] "Success" is defined as those who end up in the top quartile of the graduating class – a class deliberately designed to be composed of "pre-existing" whites, heavily "culled" Asians, and poorer performing, "affirmative action," "athletic," and "legacy" replacements, who are admitted for reasons *which include those other than academic performance.*

for the "established" (almost exclusively white) students, *relative* to the *admitted* student population.

It is an obvious and statistically verifiable fact that the culling of high-achieving Asian-American students and the introduction of under-qualified students in their stead *lowers the relative academic standards required for the "established" student population*. Even worse, "affirmative action" students drop out at higher rates than the "established" student population, leaving the "established" students to sail to the finish line of graduation *unimpeded by real competition*.

Based on this detailed statistical analysis and research, the *main* effect of affirmative action is simply to allow the not-particularly gifted offspring of the white Establishment to progress through selective high schools and universities unmolested by "unseemly" numbers of highly competitive Asian-American students.

The equation is simple: Replace hard-working ("nerdy"?) Asian-Americans with under-prepared and under-qualified[15] minorities, thus lowering the grade averages required for the *relative* "success" of the "established" student population.

Thus, in one elegant move, affirmative action makes it easier for the offspring of the white Establishment to score reasonable grades[16] and simultaneously eases their misplaced guilt over the abject poverty and disadvantage of blacks and Hispanics in their midst.

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[15] "Under-qualified" in this context is synonymous and statistically equivalent to the term "under-represented." These admitted students are only "under-represented" *because they could not make it into the class in the first place on merit alone*. In no way am I suggesting that members of *any* racial group cannot compete at the *highest* academic levels. However, if any policy is adopted whereby objective grades and student achievement is "corrupted" by *any* irrelevant consideration – race, geographic origin of the student, parental attendance at the school or college, eye color, shoe size – it is a statistically incontrovertible fact that the *average* test scores and the *average* academic achievement of that class *must* fall.

[16] Meaning the top quartile of grades, from where the pool of top freshmen and graduates is usually drawn.

Through the operation of "affirmative action," the game of educational success is subtly rigged, to benefit the "Establishment" players.

Recent arrivals don't stand a chance – many Asian-American students are simply rejected at the front gates of selective public high schools and Ivy League colleges.

Perversely, the bulk of the *graduating* classes produced by affirmative action will be "the Legacy Classes": the hard-partying, but not-particularly bright offspring of the affluent white Establishment, who can afford the horrendous costs of an "elite" education in the U.S., and who will *still* graduate with "competitive" grades *relative* to the rest of the *admitted* student population.

If affirmative action is lawfully permitted to extend into the public high school system, similar effects will occur. Affirmative action will protect the "established" students at the "preferred" high schools from being "squeezed out" of the top quartile of their class. Affirmative action at this level will simply solidify the chances of the pubescent offspring of the white Establishment getting into their parent's *alma mater*.

Meanwhile, Asian-American students will continue to be treated like high school refugees in their own land, being shoved from school to school, being told that Asian-Americans have already been "capped-out here" under the "Diversity" rationale legitimatized in *Grutter*.

Throughout high school and university, affirmative action protects "established" white students from the "unseemly" heat of real competition against Asian-Americans. The "switching" of Asian-Americans with much less qualified and competitive "affirmative action" students results in the perpetuation of the "established" student population, which just happens to include the strongest proponents of affirmative action – the rich liberal white elite.

Affirmative action is thus one of the most ingenious and beautiful examples of base self-interest dressed up as high-principled altruism ever conceived by the elite liberal Establishment.

I suggest that this is the reason why so many powerful "elite" liberal interest groups have developed a sudden

desperation to support the ostensibly altruistic "social outreach" program of affirmative action. This sudden onset of altruism is deeply ironic when donations of their considerable wealth to private charitable organizations would normally be the most direct way of benefiting these "under-represented" minorities.

Private charity is apparently not enough for the wealthy and powerful proponents of affirmative action. They shirk direct donations and instead ask the government to conduct these charitable activities for them. Exactly who benefits from such "charity" is a matter of much debate and I have my own ideas regarding the identity of the true beneficiaries.

I note that my hypothesis is *statistically verifiable and easily disprovable*. It is a simple process to verify where the burden of affirmative action falls. Fortunately this statistical work has already been done. The painstaking study by Espenshade and Chung has already established the real effects of affirmative action. The grades of graduates and their ethnicity should also be on record at "elite" universities and "preferred" high schools.[17] It is a simple process to evaluate this evidence and data – a process at least partially completed by Sandler.

Further anecdotal evidence of the brutal discrimination against Asian-American students at the public high school level is clear from the case of *Ho v. San Francisco Unified School Dist.*, 147 F.3d 854 – a case which has *particular* relevance for the matters which the Court must address in this case.

Although I speculate that these effects are known and intended, this controversial allegation is *not* necessary to establish my claim. Regardless, once these effects *are* known, it is incumbent on the proponents of affirmative

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[17] Note that one would have to show *graduation rates* and average grades for blacks and Hispanics admitted under affirmative action are not substantially lower than those for *Asian-Americans* – not whites – to disprove my thesis, but the data is available and the statistical methodology relatively simple.

action to find a way to ensure these policies do not burden Asian-American students unduly.[18]

If they do, the policy is a clear and incontrovertible violation of the Equal Protection Clause of the Fourteenth Amendment and cannot under any circumstances withstand strict scrutiny.

AFTER DECADES OF "AMELIORATIVE" AFFIRMATIVE ACTION – INCREASED INEQUALITY AND STRATIFICATION IN U.S. SOCIETY

Affirmation action has been a dismal failure if its purpose was to reduce inequality in American society and increase opportunity

In an article entitled, "*Inequality in America,*" the June 15, 2006 edition of the eminent journal *The Economist* described the extraordinary levels of stratification and inequality in the United States – and the disturbing trend towards *increasing* concentrations of wealth. One "insider" compared the trends occurring in the United States today to Brazil, with a tiny minority of inter-generational super-rich elites living amidst generations of dispossessed.

This article summarizes the research indicating that *inherited* wealth and privilege are now becoming increasing determinants of success.[19] Several studies show that parental income is a better predictor of whether someone will be rich or poor in the United States than Canada or much of Western Europe. In the United States, about *half* of the income disparities in one generation are reflected in the next. In Canada and the Nordic countries that proportion is about *a fifth*.

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[18] I believe there is enough evidence in the Espenshade and Chung study, in my personal experience, and in *Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, to show clear malice towards qualified Asian students.

[19] The extensive research papers mentioned in *The Economist* article can be found at www.economist.com/inequality (last visited Aug. 1, 2006).

According to Emmanuel Saez and Thomas Piketty of the Ecole Normale Supérieure in Paris, the share of aggregate income going to the highest-earning 1% of Americans has *doubled* from 8% in 1980 to over 16% in 2004. That going to the top tenth of 1% has *tripled* from 2% in 1980 to 7% today.

The period 1980-2004 includes the *very years* during which affirmative action has been in full flight, with extensive racial counting and balancing by unelected bureaucrats implementing a policy never been formally democratically approved nd one which has been implemented *ostensibly for the very purpose of reducing these startling disparities*.

Thus it is unarguable that, during these "affirmative action years," individual skill and ability, regardless of personal circumstances, have become *less* able to pull ambitious individuals out of the class structure in which they find themselves at birth.

Based on the research collated by *The Economist*, it appears eminently preferable in the America of today to be dumb and rich, rather than smart and poor.

This stratification and inequality is occurring during a period of the most concerted and sophisticated racial "outreach" program in U.S. history. Affirmative action has been in full flight for over 20 years, extending to all corners of the country and throughout all levels of the public and private education system, and its ameliorative effects should be clearly in evidence by now

Yet its purported benefits appear as illusory as a mirage.

However, the crucial question is *not* whether affirmative action has been an abject policy failure. The crucial question for this Court is simply whether it is an *illegal* policy, violating of the Equal Protection Clause of the Fourteenth Amendment.

THE FOURTEENTH AMENDMENT AND THE PRESUMPTION OF GOOD FAITH

To cite the plurality's own words on the Fourteenth Amendment in *Grutter*, 539 U.S. at 323:

> The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, §2. Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). We are a "free people whose institutions are founded upon the doctrine of equality." *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

I respectfully suggest that only two carefully aimed blows are needed to destroy the foundations of the plurality's reasoning.

First, recall that a *crucial* aspect of the plurality's reasoning was the presumption of good faith:

> Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary". . . .
>
> We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable.

Id., at 327, 341 (citations omitted). The plurality's presumption challenges opponents of affirmative action to show *mala fides* on the part of the educational Establishment in implementing affirmative action. It has been my reluctant duty to establish *mala fides* in the above

analysis, to the degree required to remove the presumption, thereby requiring clear, conclusive *evidence* of good faith on the part of educational bureaucrats.

Second, the plurality indicated that any policy of affirmative action must not unduly harm members of any racial group:

> We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke*, 438 U.S., at 298 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308.

Id., at 339. My analysis need not be repeated here, but I simply observe again that there is now statistically verifiable evidence of Asian-Americans being "targeted" and systematically discriminated against through the operation of affirmative action in the public education system.

If *either* of my claims has merit, then the whole foundation of the plurality's reasoning collapses. The way is then open for this Court to question the judgment in light of new research and revisit the application of affirmative action to elite universities *as well as* public high schools.

"GROUP RIGHTS" AND THE FOURTEENTH AMENDMENT

The issues that arise in *Grutter* and in the current case raise fundamental issues regarding the nature of Constitutional rights in the United States and the conception of society that the Equal Protection Clause is intended to foster. Affirmative action raises the question whether the Nation is constituted by *individuals* with the legal right to exploit their talents and abilities *as individuals*, or whether it is constituted by indivisible *groups*, each one accorded rights depending on their identity with their *group*.

This latter conception is fundamentally rooted in a socialist conception of society and is one the Founding

Fathers absolutely rejected and one that is fundamentally antithetical to the Equal Protection Clause and the general contextual language of that seminal affirmation of *individual* equality before the law.

THE DYSFUNCTION OF USING "RACIAL STEREOTYPES" TO DEFINE SOCIAL GROUPINGS

Let me take this point further, one that appears to have been overlooked by every member of the majority in *Grutter*. Once the Court moves down the path of accepting the validity of "group rights," one must first *define* the groups to which each member of society belongs. This is an obvious and fundamental requirement. If this is not possible, the whole architecture of any conception of group rights collapses.

The group rights postulated by the respondents in this case, and in the *Grutter* case, are "racial" groups. They argue that groups of society can be broken down into "racial" groupings, each with something different to contribute to a "diverse" class of high school or university students.[20]

Instead of simply accepting the reality of "racial" groupings, let us pause and define our terms.

Most evolutionary biologists question the very concept of "race," believing it to be a cultural construct without scientific meaning. Even the most rudimentary research into this area reveals the questionable scientific basis of the concept. To quote from Wikipedia:[21]

> Conceptions of race, as well as specific racial groupings, vary by culture and over time and are often controversial, for scientific reasons as well

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[20] "Classroom discussion is livelier, more spirited and simply more enlightening and interesting when students have the greatest variety of backgrounds." *Id.*, at 327 (citation omitted). Note: "variety" meaning racial diversity.

[21] A source arguably more accurate than Encyclopedia Britannica. See www.nature.com/news/2005/051212/full/438900a.html

> as their impact on social identity and identity politics. . . .
>
> Many evolutionary and social scientists think common race definitions, or any race definitions pertaining to humans, lack taxonomic rigor and validity. They argue that race definitions are imprecise, arbitrary, derived from custom, and that the races observed vary according to the culture examined.[22]

Possibly because of the long history of fairly straightforward black-white segregation in the United States (and the near wiping out of indigenous American Indians early in the Nation's history), there appears very prevalent in legal and other writings on this issue the simplistic notion that people can easily be clumped into defined racial groupings. Do these "groupings" make any sense today, in a multi-racial world?

It is well known that Europeans thought of themselves as made up of distinct and separate "ethnicities" which in turn could be considered at an extreme level as distinct "races." For example, for most of European history, it has been socially acceptable to consider the Jew somehow different from the Gentile, as Shakespeare's *The Merchant of Venice* illustrates.[23] Would it be acceptable in the United States today to more accurately divide up the "white" race into Jew and Gentile? If not, why are the other racial categorizations and divisions of equally questionable scientific foundation acceptable when this is not?

Looking further into this vague and undefined "white" racial class, the plurality appears to have a very dim view of this "race." It is assumed by the plurality in *Grutter* that the established (white) student population is somehow unable to treat "other" minority races as "real" human beings without sufficient numbers of these races in their midst in every class they attend; they require a "Critical

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[22] http://en.wikipedia.org/wiki/Race

[23] See also http://en.wikipedia.org/wiki/Anti-Semitism.

Mass" of other races to break down the stereotypes that have somehow been fused into their brains from birth.[24] So under-qualified minorities are rolled into class like some Orwellian game of "show and tell," to prove these alien life forms are "human beings" with real views and opinions "just like us."

The unsupported belief that these students have fused, stereotypical views of *other* races is at the heart of the plurality's reasoning in *Grutter*, and is profoundly demeaning to the tolerance and intelligence of the majority student population.[25]

Extracting any sense from the plurality's babble on "diversity" at this point is difficult, because, whilst they state that the "Law School does not premise its need for critical mass on any belief that minority students always (or even consistently) express some characteristic minority view-point on any issue"[26] they state in the same breath that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[27] It can only be more interesting *if* minorities hold *consistently different* views *compared* to the majority class members.

So the plurality is either stereotyping the established white student population as somehow irredeemably racist *or* presumptuously stereotyping "minority" students as having consistently different views compared to the

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[24] "The Law School's admissions policy promotes cross-racial understanding, helps break down stereotypes, and enables students to better understand persons of different races." *Grutter*, 539 U.S. at 328 (internal quotation marks and reference omitted).

[25] *Id.* at 327-328, essentially arguing that the implicit racism of the existing student population can only be broken down by the presence of a critical mass of each "minority," as if bringing in under-qualified minorities somehow breaks down stereotypes. See Justice Scalia casually punch holes in this argument. *Id.*, at 347-348.

[26] *Id.*, at 330, internal quotation marks and reference omitted.

[27] *Id.*, at 328, internal quotation marks and reference omitted.

majority – or both. Their presumptuous stereotyping of the whole student population goes around in small circles in a dizzying display of sophistry.[28] Their central argument appears to involve the implicit assumption that the majority student population is made up of judgmental fools, without any basis for making the assumption. This then necessitates the remedy of "diversity," pushing underqualified minorities under the noses of the majority student population to enable them to get a good "whiff" of other perspectives, thereby solving a problem no one proved existed in the first place.

Admittedly, it is difficult to nail down precisely what the plurality is saying at this point in the judgment because the plurality persists in quoting *inconsistent* platitudinous snippets from the respondents, and amici supporting the respondents, which, patched together, have no clear or consistent logic.

Turning away from the apparently pitiful state of the established white student population, and taking another angle on this argument: Where should the boundaries of each "racial" group be drawn?

Take me as an example. I am of a racial "grouping" commonly denoted in some circles as "Eurasian." In other circles, I could be denoted (incorrectly) as "Asian," or "mixed race." No doubt the list of descriptors could be widened to include other expressions.

One of the most difficult aspects of taking the GRE to gain admission to post-graduate studies in the U.S. involved the requirement to specify my "race." I found the rest of the GRE a breeze compared to this question. I had never been asked this question by any agent of any government in any context, and the question puzzled me. The racial classifications indicated on the front page of the GRE made no sense to me, and continue to make no sense to many others, including Robert Murdoch's two young children, Tiger Woods, Keanu Reeves, and Mariah Carey.

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[28] See Justice Thomas's similar critique. *Id.*, at 357.

Race makes no sense at the margins. And the margins are increasing every day.

For those who cannot accept this argument, who believe in the reality of "race" as a functioning "knife" which can cut into society and cleanly divide up the populace without spilling one drop of ethical blood, I posit an alternate argument.

If "race" exists, if it is a real and functioning tool of the educational bureaucracy, I posit that my race is *neither* "white" nor "Asian" but "Eurasian." I know of no person beyond my family circle who is from both backgrounds. My older brother is the only other "Eurasian" person I know with any degree of familiarity. However, the fact that the number of members of our "race" is small *does not make it any less real.*

Before the argument is dismissed, I suggest there are serious issues to be addressed. Genuinely unique insights can come from those of mixed race background.[29] These "insights" could represent a valuable asset for any *genuinely* diverse class, based on the "diversity" reasoning of the plurality in *Grutter*.[30]

I therefore formally seek the declaration of a new race: the "Eurasian" race. I have even come up with a new name: the "Cream" race.

This begs an obvious question, one again overlooked by the Court in *Grutter*: What *precise criteria* are used when deciding on racial classifications in the U.S.? *Where* do I apply to have a "new" race included in the racial definitions used in the U.S.? What criteria *should* be used to deny this new racial classification?

My research has revealed useful guidelines to define a "race." Nazi Germany made "a good fist" of the attempt to obsessively classify by race, when defining Jews and "pure" Aryans by reference to the "race" of the grandparents.[31]

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[29] This brief for example.

[30] *Grutter*, 539 U.S. at 326-328.

[31] http://en.wikipedia.org/wiki/Racial_policy_of_Nazi_Germany.

These guidelines could perhaps be adopted by the United States government in defining the various "races." Apartheid South Africa also had detailed guidelines regarding the definition of the various "races" which the Apartheid government believed existed in that country.[32]

Turning back to my argument, once the new mixed "Cream" race is accepted by the educational Establishment, it will be a short step to prove my eviscerating educational isolation in a hostile world full of non-Eurasians.

Looking back, I now realize I often looked around at my fellow classmates, searching in vain for the Eurasian in the sea of "white," "black" and "Hispanic" faces, but to no avail. I was always, in every high school and university class I ever attended, the only Eurasian in the group. The emotional and educational scars are still deeply embedded within me, and have possibly triggered the need the write this brief, begging for the situation to be changed, on behalf of all isolated, educationally stunted "Creams." The search should henceforth go out for Eurasians across the United States to ensure that in every class these isolated, vulnerable individuals attend, there is the now sanctified "Critical Mass" – the Magic Threshold Number – of Eurasians, to huddle together and protect themselves against the otherwise hostile world of "foreign" races in their midst. The airfares for Eurasians to attend classes together in public high schools across the country would surely be worth the expense.[33]

The ugly truth is that the obviously useless, incoherent, frankly bizarre concept of "race," treated with such reverence by the plurality in *Grutter*, is, at its heart, an unscientific and archaic product of racist segregation – itself now (thankfully) outlawed.

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[32] http://en.wikipedia.org/wiki/Apartheid.

[33] The respondents' justifications for "critical mass" listed by Chief Justice Rehnquist, *Grutter*, 539 U.S. at 384, include the need "to ensure these minority students do not feel isolated."

I posit yet another argument to blow the racial classifiers out of their complacency, to get them to see the hollowness of the concept of race. If my claim for the existence of the "Cream" race fails, then I raise an alternate, equally arguable claim. There is solid scientific evidence that *all* humans originated from sub-Saharan Africa. For those not familiar with current theories of paleoanthropology, this is known in scientific circles as the "Out of Africa" theory of human evolution.[34]

Based on this scientific evidence, I can confidently assert that at some point in my ancestry there were undoubtedly "black" roots. I can legitimately claim a common ancestry with those who are conventionally described as "black." I therefore wish to reclaim my black heritage and assert my right to be defined as "black" on every governmental and educational classification – and strongly recommend all Asian-Americans do the same. Currently the classification of "race" is based on self-selection. I believe there are perfectly reasonable, scientifically-based arguments to permit me to claim that most of my DNA comes from my black-African ancestors. Other "races" can make exactly the same assertion. Once we all tick that valuable "Black" box, we should all reasonably expect to receive the benefits that this racial classification appears to bestow on its beneficiaries.

What does this suggest? Having "objective" criteria that *compulsorily* categorizes the populace by race is unacceptable – yet that is ultimately what will *have to occur* for these "racial" categories to be functional. Yet if this is done, the odious history of governments imposing racial classifications on the unwary, naïve populace and the implicit racist undertones of the whole philosophy underlying affirmative action are openly exposed. So the United States government and its educational bureaucracy have yet to *impose* racial classifications on the populace and a curious stalemate exists where the government has the *unilateral*

[34] http://en.wikipedia.org/wiki/Recent_single-origin_hypothesis.

power to define which "races" can be used to break the populace apart into groupings, but the populace is permitted to *choose* which group it belongs to. But no one is given clear guidance as to which group they *should* belong.

So this inherently unworkable policy of voluntary "racial" self-classification staggers on like a zombie, without any defendable philosophical or scientific foundation.

THE "DIVERSITY" RATIONALE AND ITS IMPLICATIONS: NO ONE IS SAFE

I wish to present an even more controversial *reductio ad absurdum*; one inspired by Justice Scalia's dissent in *Grutter*, 539 U.S. at 349:

> *And therefore*: If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate – indeed, *particularly* appropriate – for the civil service system of the State of Michigan to do so.

One "civil service" category Justice Scalia might have had in mind is the judiciary itself.

According to the plurality, "legitimacy" is accorded to a system where access is "open to talented and qualified individuals of every race." *Id.*, at 330. Now that affirmative action has been exposed as a policy of Asian-American "culling," what happens to this "legitimacy," even at the highest levels of government and the judiciary?

Affirmative action has been in place for over 20 years. The current members of the Supreme Court are a product of these policies. I note in passing that no Asian-American is on – or has ever been on – the Supreme Court bench. The percentage of Asian-Americans who have ever warmed the Supreme Court benches is precisely 0.00%.

In fact, Asian-Americans appear remarkably *under*-represented in the corridors of power in the U.S. legal system. Therefore, using the plurality's *own words* and

turning them on the Supreme Court itself – the currently constituted Supreme Court is not a "legitimate" forum to rule on matters pertaining to racial justice for Asian-Americans. No Asian-American currently sits on the bench of this Court, and its composition is, arguably, a product of exclusionary policies which have denied admission to qualified Asian-American students for many years.

Using *their own arguments*, we can legitimately speculate that their own reasoning in *Grutter* did not touch on Asian-Americans because they themselves have not had the benefit of a "Critical Mass" of Asian-American judges, creating the stimulating *frisson* that can only come from a genuinely "diverse" Court.[35]

Certainly it was not as though the damaging and discriminatory effects of affirmative action had not been raised by others. The amicus curiae brief of the Asian-American Legal Foundation in the *Gratz* and *Grutter* cases clearly summarized the history of anti-Asian discrimination in the United States and eloquently described the relentless determination of high school district administrators to cull Chinese-American student numbers, as illustrated in the appalling case of *Ho v. San Francisco Unified School Dist.*, 147 F.3d 854. This chilling amicus curiae brief should be read carefully, given the matters raised in this case.

Perhaps only an Asian-American judge could have seen what others could not?

PHILOSOPHER-KINGS OR SERVANTS OF THE CONSTITUTION?

At this point I wish to raise serious issues regarding the role of this Court, but wish to do so in an open way which hopefully will offend no one. No disrespect is intended, and I

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[35] See *Id.*, at 322, 327 for discussion of the "substantial" benefits of this intellectual *frisson*. Note: *only* in the principled dissent of Justice Thomas was there *any* consideration given to ensuring fair treatment of Asian-Americans. *Id.*, at 378. The plurality blithely *assumed* fair treatment was occurring. *Id.*, at 317.

hope none is taken. However I need to make my point forcefully if my points are to be made at all.

The Economist, in its June 29, 2006 edition, in an article entitled "The Supreme Court" described the current Supreme Court as being pulled between two broad camps – the "philosopher-kings" who are the activist judges, intent on twisting the Constitution to create laws that the Congress is too timid to pass, and the "conservatives," who wish to apply the Constitution faithfully, applying its words as the Founding Fathers would have intended.

Of the many judgments in the *Grutter* and *Gratz* cases, one stands out above all others as the very best example of the latter kind of judge. That is the reasoning of the dissent of Judge Boggs in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). This is the work of a stunningly brilliant legal mind, courageous in its attack on the cant of affirmative action, relentless in its meticulous reasoning, respectful of no one and nothing but the Constitution. One can clearly see in his reasoning the intimate understanding, the deep knowledge and familiarity – the love – he has of the Constitution.

The members of the majority in *Grutter*, on the other hand, are *The Economist's* "philosopher-kings" (and queens), bending the Constitution to their will. For these philosopher-kings, the simple words of the Constitution represent an awkward obstacle rather than a set of timeless ethical principles from which stem the foundation stones of their society.

Why does the plurality twist the meaning of the Fourteenth Amendment to the breaking point? Why dilute the strict scrutiny test until the test itself dissolves into nothing?[36]

There is a sense in the plurality's reasoning that they believe they are not only judges, but public policy experts, able to evaluate and weigh social science "evidence,"

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[36] See Justice Kennedy's cautionary dissent, *Grutter*, 539 U.S. at 398.

instead of sticking with the narrow responsibility of applying straightforward Constitutional principles.[37] Once the decision is made to support the educational Establishment, the plurality then grabs at fragments of "research" and amici briefs to piece together a poorly sewn patchwork of platitudes and *inconsistent* arguments to defend the policy – and assiduously avoids the simple application of the strict scrutiny doctrine.

The members of the whole majority abdicate their roles as judges, instead transforming themselves into "gullible"[38] public policy experts. The powerful educational Establishment is now, by virtue of the timidity and "gullibility" of the plurality in *Grutter*, unfettered by the very laws designed to constrain the impulse to discriminate that appears to arise perpetually in the hearts of men who wish to preserve the *status quo*.

Through the careful, selective presentation of evidence, the proponents of affirmative action essentially duped the plurality into believing the policy was an altruistic, inclusive "social outreach" program for the under-represented, rather than a policy of racial exclusion, protecting the offspring of the Establishment from the fire of real competition.

Whilst abdicating their roles as judges, the majority entered into a public policy debate where they have no expertise and no role to play.

The analysis is entirely the wrong away around. This Court's sole responsibility is to interpret the Constitution *regardless* of the "social benefits" of any policy presented for validation – that is for the *democratic process* to address.

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[37] Contrast the Court's circular strict scrutiny "reasoning" in *Grutter*, 539 U.S. at 328-331 with Chief Justice Rehnquist at 391 and Justice Kennedy at 398.

[38] I use the term advisedly. Justice Scalia used this very term in his dissent: *Grutter*, 539 U.S. at 347.

DEMOCRACY WORKS

The democratic process can deal with the complex public policy issues raised by affirmative action. The Constitution is a living document, and open debate can take place regarding whether Asian-Americans should be "capped-out" pursuant to transparent *numerus clausus*[39] admissions policies for the benefit of the other "races" in the "elite" student pool.

The Constitution has been amended before and it can be amended again.

I can even suggest a new version of the Equal Protection Clause of the Fourteenth Amendment for the proponents of affirmative action and their liberal lobbyists:

> Everyone is Equal before the Law. Except Some are more Equal before the Law than Others.

Guidance on these new, democratically approved laws can be gleaned from other "cutting edge" affirmative action nations – such as Malaysia.

Malaysia's "New Economic Policy" bears a remarkable similarity to the current anti-Asian affirmative action policies practiced by bureaucrats within the public education system of the United States – or rather the reverse, as the U.S. public education system cannot even call its policy original, given that the Malaysian government has had something very similar in operation for well over 30 years. Eric Ellis, the South-East Asian correspondent for *Fortune Magazine*, described former Malaysian Prime Minister Dr. Mahathir Mohammad's version of affirmative action as: "Mahathir's cronified network of *bumiputra* (ethnic Malay) tycoons spoon-fed government deals and wealth."[40]

The legacy admissions and affirmative action systems bear all the hallmarks of the "spoon-fed" privilege in Malaysia, the

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[39] For details regarding the history of *numerus clausus* capping of "over-represented" students at elite universities in the U.S., see Alan M. Dershowitz, *Chutzpah* (Simon and Schuster, New York, 1992) at 71-76.

[40] "Mahathir's vision turning a bit sour." *The Sydney Morning Herald*, June 13, 2006 at 13.

same "cronified network" of ethnic privilege, growing fat and slow within its own fenced-off academic community. To see how they protect their turf, one need only read the background to *Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, contained in the Asian-American Legal Foundation's amicus curiae brief in *Gratz* and *Grutter*.

What I object to in all of this is the childish deception – the fact that the voting public is not made aware of the real effects of affirmative action. What I also object to is the fact that they are not given the chance to vote maturely *in favor* of discriminating against Asian-Americans.

It is just possible they might vote against it. But the democratic option is there.

RELEVANCE TO THE CURRENT CASE

What relevance does this discussion have for the matter before the Court in this case, regarding the use of racial criteria as "tie-breakers" where there are too many applicants to a public high school class?

First, it is laughable to suggest that all public schools are equal. If they were, there would be no need for "tie-breaker" criteria. The very fact that there is competition for spaces means there are differences (both perceived and real) and there must be a way of breaking the tie. The simple reality is that a racial tie-breaker will force some parents to send their children to worse schools farther from home simply because of their race. Based on the analysis above, those *most likely* to be disadvantaged by the policy will be Asian-Americans.

Second, given the research outlined above, and the deplorable examples of ruthless discrimination described in the Asian-American Legal Foundation's amicus curiae brief in *Gratz* and *Grutter*, an absolute and unambiguous prohibition on using race as a tie-breaker *must* be issued.

Third, alternative tie-breakers such as test scores and parental income tests should be encouraged to replace prohibited race-based tie-breaker criteria.

Fourth, the presumption of "good faith" of the educators when any issue of "affirmative action" is raised should

not simply be treated with suspicion; it should be treated with derision. The first question to ask should now and forever be: *What is the demonstrable effect of the policy on Asian-Americans?*

AFFIRMATIVE ACTION IS AN INTERNATIONAL CRIME

Even if affirmative action is deemed by some twisted logic to be Constitutional, there is the minor issue that the practice amounts to an international crime.

Given that the policy of affirmative action has been in place throughout the public education system for well over 20 years, given that equal access to a quality education is one of the most fundamental and valuable rights any citizen can possess,[41] and given the recent research showing Asian-Americans being systematically "targeted" for culling via the policy, I respectfully suggest that the policy amounts to one of the most long-continued and systematic violations of the human rights of an ethnic minority in any Western country in modern times.

The policy is a clear violation of Section 702(f) of the *Restatement of the Law 3rd: Foreign Relations Law of the United States* (1986).

The relatively recent case of *Kadic v. Karadzic*, 70 F.3rd 232 (2nd Cir. 1995), rehearing denied, 74 F.3rd 377 (2nd Cir. 1996) *cert. denied* 518 U.S. 1005 (1996), is a useful starting point for those unfamiliar with these basic principles of international law.

However, I do not wish to belabor this point for one simple reason: principles of international law have no relevance whatsoever in this Court.[42]

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[41] See for example the extraordinary significance of an Ivy League law degree highlighted in *Grutter*, 539 U.S. at 330.

[42] This issue is beyond the scope of this brief (see *Lawrence v. Texas*, 539 U.S. 558 (2003)). Under commonly accepted dualist international law principles, the domestic legal system of the United States

(Continued on following page)

SYSTEMATIC RACIAL DISCRIMINATION IS ILLEGAL BUT NOT IMMORAL

I wish to make clear that although affirmative action cannot withstand strict scrutiny based on the demonstrable fact that it has an intensely focused, negative effect on Asian-American students, I have no moral objection with any public education system "capping" the number of Asian students under transparent *numerus clausus* admissions policies, thereby denying some students an education based mainly or even solely on their "race," for the benefit of some amorphous "diversity" rationale or indeed for any other reason.

It happens to be prohibited under the *current* U.S. Constitution, but this is a separate issue from whether it is *immoral* in an absolute sense. U.S. public policy experts and educators may have very good reasons to discriminate against Asians, Jews, Catholics, Freemasons, Illuminati, Scientologists, Zoroastrians, or any other racial, religious or other "grouping" they feel is "over-represented" in the elite education system, or indeed *any* other field of American endeavor. That is for the domestic political system to debate and decide. Other countries have *legally* adopted similar policies – including India and Malaysia.

If *any* country wishes to "cap" a successful minority to ensure it does not become "too" successful, based on my libertarian beliefs I consider this is *profoundly misguided*, but any country is perfectly entitled[43] to do so, *provided*

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should not concern itself with international law when deciding a dispute between two parties within the municipal legal order. See for example Timothy D. Mak, *The Case Against an International War Crimes Tribunal for the former Yugoslavia*, International Peacekeeping (London), Vol. 2, No. 4, 536-563 (1995).

[43] Practically, not legally. The practice is a violation of Section 702(f) of the *Restatement of the Law 3rd: Foreign Relations Law of the United States*, but that has not stopped nations in the past and will not stop them in the future.

there are the appropriate domestic laws enacted to allow this to continue.

I do *not* ask for a change to the policy if the voting public consider it justified.

At the heart of it all, I simply ask for honesty.

I simply ask that the U.S. public education system stop the masquerade, admit the obvious reality that the primary effect of the "diversity" rationale underpinning affirmative action is to cap Asian-American students and admit it is doing this for justifiable reasons. The democratic process can then work, with voters being asked to make the policy legal, presumably by way of a Constitutional amendment permitting systematic racial discrimination in public education provided it only occurs against those of Asian descent.

The public education system ultimately has the *moral* right to discriminate against Asian-Americans because this is a matter for the voters of the United States *alone* to decide upon. No "alien" should presume to judge the *morality* of the public education policies of the U.S., nor the internal policies of *any other sovereign nation*.

To hold any other position would expose oneself to the accusation of the vilest hypocrisy.

CONCLUSION

Race-based criteria for admissions in public education are a violation of the Equal Protection Clause.

Respectfully submitted,

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